No. 88-1392

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1988

RAPHAEL SOSA UGALDE,

*Petitioner,*

v.

STATE OF GEORGIA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia**

## BRIEF IN OPPOSITION FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1.

Does the question of a conflict in holdings between two decisions of the same state court fail to present a federal constitutional question which would justify this Court's exercising of its certiorari jurisdiction?

2.

Did the Court of Appeals of Georgia properly conclude that Petitioner consented to the search in the instant case, thus eliminating any necessity of finding probable cause?

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## BRIEF IN OPPOSITION FOR THE RESPONDENT

## PART ONE

## STATEMENT OF THE CASE

Petitioner, Raphael Sosa Ugalde, was indicted by the grand jury of Clayton County, Georgia, for the offense of trafficking in cocaine in that Petitioner knowingly brought into the state and was knowingly in actual possession of more than twenty-eight grams of a mixture with a purity of more than ten percent cocaine. Prior to trial, Petitioner filed a motion to suppress based upon the search and seizure of the cocaine. The hearing was held on the motion to suppress on January 14, 1988. Following

that hearing, the trial court issued an order summarily granting the motion on January 26, 1988. On February 11, 1988, pursuant to motion by the state, the trial court amended its original order granting the motion to suppress to state more specifically its reasons for suppressing the evidence. The state subsequently filed a notice of appeal to the Court of Appeals of Georgia on February 10, 1988.

On appeal, the state asserted that the trial court erred in granting the motion to suppress, focusing on the trial court's ruling that the search was improper based upon an alleged request for counsel in relation to the consent to search. After reviewing the case, the Court of Appeals of Georgia reversed the decision of the trial court concluding that there was consent for the search and that the request for counsel did not impact on the validity of the search. *State v. Ugalde*, 188 Ga. App. 592, ___ S.E.2d ___ (1988). The Petitioner subsequently filed a petition for a writ of certiorari in the Supreme Court of Georgia which was denied on November 9, 1988.

Petitioner has now filed the instant petition for a writ of certiorari in this Court challenging the decision of the Court of Appeals of Georgia.

## PART TWO
## STATEMENT OF THE FACTS

The following facts were set forth by the Court of Appeals of Georgia in relation to the search in question:

Evidence adduced at the hearing on the motion to suppress reveals that Joseph Dallas, a federal narcotics agent on duty at the Atlanta airport, observed appellee walking up the concourse with a tote bag away from the gate where a flight from Fort Lauderdale, a known drug source city, had just landed. He determined that appellee stopped at another gate to ask for directions for his connecting flight to Knoxville; that only one person, a Raphael Ugalde, was travelling alone from Fort Lauderdale to Knoxville; that passenger Ugalde paid cash for his ticket the previous night; and that he had left a false callback number with the airline. Based on this information, which matched elements of the drug courier profile, Dallas decided to interview appellee. Thereupon, Dallas, who was dressed in casual clothes and carrying a concealed weapon. approached appellee at the Knoxville departure gate. Dallas ascertained from appellee that his ticket was issued in the same name as his driver's license, Raphael Ugalde, and that he had no baggage tickets. Dallas also testified that appellee's "hands were kind of shaking."

Fellow narcotics agents Paul Markonni and Rick Jordan, upon joining the conversation between Dallas and appellee, suggested that they move to the edge of the seating area, which appellee agreed to do. Informing appellee that they were looking for narcotics, the agents asked if he would agree to a search of him and his tote bag, to which appellee responded he wanted to call his attorney first. Appellee agreed to accompany the agents to an airline office two gates away to make his call, but when he reached the office he was unable to find his attorney's phone number in his bag. Markonni then stated that appellee did not need to consult with counsel to consent to a search, and again requested permission to search, to which appellee responded,"[g]o ahead, do it."The search yielded seven containers of what appeared to be cocaine concealed in his pocket and tote bag.

*Ugalde v. State,* 188 Ga. App. 592-3.

Further facts will be developed as necessary to examine the issues presented in the instant petition for a writ of certiorari.

## PART THREE

## REASONS FOR NOT GRANTING THE WRIT

### I. THIS COURT SHOULD DECLINE TO GRANT THE INSTANT PETITION AS TWO OF THE FOUR QUESTIONS PRESENTED SIMPLY INVOLVE PURPORTED CONFLICTS BETWEEN DECISIONS OF COURTS OF THE SAME STATE AND, THEREFORE, DO NOT ESTABLISH A BASIS FOR CERTIORARI JURISDICTION.

In the instant petition, Petitioner first seeks to have this Court grant certiorari because of an alleged conflict between rulings by panels of the Court of Appeals of the State of Georgia. As his fourth question presented, Petitioner seeks to have this Court grant certiorari to determine whether this case is sufficiently distinguishable from another case from the Court of Appeals of Georgia and a subsequent opinion by the Supreme Court of Georgia to make the law of those state court cases inapplicable. Essentially, Petitioner is seeking to have this Court resolve purported conflicts among courts of the same state. Respondent submits that this fails to establish a sufficient basis for certiorari jurisdiction by this Court. This Court normally does not entertain petitions for writs of certiorari to resolve simple conflicts between either courts of the same state or different panels of Court of Appeals."Whatever procedures a Court of Appeals follows to resolve these problems – doubt about the respect to be accorded to a previous decision of a different panel

should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). *See also, Davis v. United States*, 417 U.S. 333, 340 (1974) (noting denial of certiorari based on simple intracircuit conflict). Therefore, Respondent submits that Petitioner's questions one and four present no basis for the exercise of certiorari jurisdiction by this Court.

## II. THIS COURT SHOULD DECLINE TO GRANT THE INSTANT PETITION AS THE REMAINING ISSUES RAISED BY THE PETITIONER CONCERN QUESTIONS OF EVIDENCE AND SPECIFIC FACTS AND AS THE RULING BY THE COURT OF APPEALS WAS PROPER.

Petitioner's second and third questions and reasons for granting the instant petition also do not present a basis for granting certiorari by this Court. Petitioner's main complaint is a challenge to the ruling by the Court of Appeals of Georgia reversing the trial court's granting of a motion to suppress. Although part of the brief addresses the question of the lack of probable cause, the entire focus of the petition is that the Court of Appeals incorrectly concluded that there was consent for the search. This Court has noted, "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 263 U.S. 220, 227 (1925). Petitioner's request in the instant case is nothing more than a request that this Court review the same facts reviewed by the Georgia Court of Appeals and reach a different conclusion on whether there was consent for the search.

Respondent submits that this simply presents an insufficient basis for this Court's exercising its certiorari jurisdiction.

Furthermore, a review of the facts and the opinion of the Court of Appeals of Georgia shows that it is clear that the question of probable cause simply does not arise as the search was conducted pursuant to consent of the Petitioner. This consent is plain from the record. As noted previously, the trial court, while granting the motion to suppress, specifically stated, "the Court finds that the testimony of DEA Agent Dallas are substantially the facts as they actually occurred in this case." (Petitioner's appendix A). Based on this conclusion, the Court of Appeals of Georgia properly found that this necessarily implied a credibility finding and that crediting the testimony of Agent Dallas showed that the search was made based upon the consent of the Petitioner. Therefore, as there were sufficient facts from which the Court of Appeals could conclude, based upon an implied credibility finding of the trial court, that there was consent to search, this simply presents no basis for the granting of the instant petition.

The totality of the circumstances test utilized by this Court in *Schneckloth v. Bustamore,* 412 U.S. 218 (1973), clearly reflects consent to search under the facts of the instant case. Respondent would submit that probable cause did exist, but that the existence of probable cause is simply not necessary under the circumstances of the

instant case and that the Court of Appeals correctly concluded that there was consent to search based upon the implied factual findings by the trial court.[1]

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[1] One issue addressed by the trial court and by the Court of Appeals of Georgia, that is, the question of the request for counsel in a Fourth Amendment context, has not been raised in the instant petition for a writ of certiorari and, therefore, does not present a basis for the granting of the instant petition.

## CONCLUSION

For all of the above and foregoing reasons, Respondent prays that the petition for a writ of certiorari filed on behalf of Raphael Sosa Ugalde be denied.

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